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Working Group on Arbitrary Detention

Opinions adopted by the Working Group on Arbitrary Detention at its eighty-first session, 17–26 April 2018

Opinion No. 4/2018 concerning Gaspar Matalaev (Turkmenistan)

1. The Working Group on Arbitrary Detention was established in resolution 1991/42 of the Commission on Human Rights, which extended and clarified the Working Group's mandate in its resolution 1997/50. Pursuant to General Assembly resolution 60/251 and Human Rights Council decision 1/102, the Council assumed the mandate of the Commission. The mandate of the Working Group most recently extended for a three-year period in Council resolution 33/30.

2. In accordance with its methods of work (A/HRC/36/38), on 17 January 2018, the Working Group transmitted to the Government of Turkmenistan a communication concerning Gaspar Matalaev. The Government has not replied to the communication. The State is a party to the International Covenant on Civil and Political Rights.

3. The Working Group regards deprivation of liberty as arbitrary in the following cases:

(a) When it is clearly impossible to invoke any legal basis justifying the deprivation of liberty (as when a person is kept in detention after the completion of his or her sentence or despite an amnesty law applicable to him or her) (category I);

(b) When the deprivation of liberty results from the exercise of the rights or freedoms guaranteed by articles 7, 13, 14, 18, 19, 20 and 21 of the Universal Declaration of Human Rights and, insofar as States parties are concerned, by articles 12, 18, 19, 21, 22, 25, 26 and 27 of the Covenant (category II);

(c) When the total or partial non-observance of the international norms relating to the right to a fair trial, established in the Universal Declaration of Human Rights and in the relevant international instruments accepted by the States concerned, is of such gravity as to give the deprivation of liberty an arbitrary character (category III);

(d) When asylum seekers, immigrants or refugees are subjected to prolonged administrative custody without the possibility of administrative or judicial review or remedy (category IV);

(e) When the deprivation of liberty constitutes a violation of international law on the grounds of discrimination based on birth, national, ethnic or social origin, language, religion, economic condition, political or other opinion, gender, sexual orientation, disability, or any other status, that aims towards or can result in ignoring the equality of human beings (category V).

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Submissions

Communication from the source

4. Gaspar Matalaev, born in 1982, is a national of Turkmenistan who resides in Turkmenabad, the second-largest city in the country.

5. According to the source, Mr. Matalaev used to work as a minibus driver in the city of Turkmenabad. The source reports that, in addition to his official driving duties, he worked discretely as a human rights defender and an independent reporter for Alternative Turkmenistan News. In this connection, he had been reporting on the massive use of forced and child labour in the cotton fields, where tens of thousands of people were regularly forced to collect cotton under threat of punishment, including termination of employment. As a result of his activities as a monitor, Mr. Matalaev was arrested in October 2016, two days after he had published a report on the extensive use of forced labour and one day after the Minister of National Security had been reportedly severely reprimanded by the President at a State Security Council meeting for not "being able to control the appropriate government bodies".

6. According to the source, Alternative Turkmenistan News, an independent Internet news source that has been covering affairs on Turkmenistan for the past four years, has been critical of the repressive policies and practices of Turkmenistan and, as a result, has been known in the country as a critical voice outside the country.

Arrest, detention and interrogation

7. According to the source, Mr. Matalaev was arrested at his home on 4 October 2016 at around 11 p.m. The source reports that four police officers in plain clothes came to his house before midnight and asked to speak to him before arresting him without presenting a warrant. They also confiscated the mobile telephones of Mr. Matalaev and his brother. The source notes that the four men introduced themselves as police officers, but since they did not produce any identification, it is still unclear if they were actually police officers.

8. During the arrest, the officers stated that Mr. Matalaev was being arrested as a result of his posting of some photographs on the Internet. He had reportedly posted photographs on the Alternative Turkmenistan News website on 2 October 2016 that showed enforced cotton picking.

9. The source reports that since his arrest, Mr. Matalaev has been detained at the Turkmenabad City Police Station in Lebap Province, under the control of the Ministry of Internal Affairs. It is, however, unclear which department ordered Mr. Matalaev's detention since he has never seen any orders or papers related to it. Although he was kept at the local police station, he was interrogated by agents of the Ministry of National Security, which would seem to be an unusual practice given the charges presented by the Government. According to the source, agents of the Ministry of National Security are normally involved in sensitive political cases.

10. After his arrest, the whereabouts of Mr. Matalaev were reportedly unknown to his family for several hours. The morning after his arrest, his family received a call from his telephone saying that he would be released within a couple of hours. However, he was not released as promised. The family was also told that they would be able to see him on 6 October and to bring him clothes and food. However, the family was not allowed to see him on that day either. The clothes and food brought by his family were accepted by the authorities. The source reports that the family and relatives of Mr. Matalaev did not have access to him throughout his pretrial detention, that is from his arrest on 4 October 2016 until his trial on 8 November 2016. The police reportedly did not provide his relatives with any reasonable explanation or grounds to deny their requests to visit him.

11. According to the source, Mr. Matalaev was held without charges for 15 days, and he was only officially charged on 21 October 2016 with fraud (art. 228, part 2) and bribery (art. 185, part 2), in conjunction with an article specifying the types of accomplices (art. 33, part 4) of the Criminal Code of Turkmenistan.

12. The source alleges that Mr. Matalaev was repeatedly tortured with, among other things, electric shocks in order to make him confess.

13. Under the official charges of fraud, the State reportedly maintained that Mr. Matalaev had taken, by deceit, a sum of 2,400 manat (equivalent to $685) from one of his female friends, and in return had promised to find her a job within three months as an assistant cook at the Farab branch of the Chinese National Petroleum Corporation. Furthermore, the State contended that Mr. Matalaev had appropriated the money and failed to fulfil the promise.

14. According to the source, the female friend of Mr. Matalaev was arrested and detained by the police for 15 days at approximately the same time as Mr. Matalaev himself. Soon after her release, the charges against Mr. Matalaev were filed. The friend had reportedly joined Mr. Matalaev on labour-monitoring missions, and she had allegedly been arrested and questioned as a result of her human rights activities. The source notes that, due to the difficulties in communicating and the lack of access to sources of information, it remains unknown whether she was tortured in order to make these statements and testify against Mr. Matalaev. According to the source, it remains clear, however, that the statements by the female friend were mostly likely the result of police pressure. The statements were written in a formal legal language, using standard phrases that she would not normally use. It is worth noting that Mr. Matalaev was accused solely on the basis of his female friend's testimony, which was not corroborated in court.

15. The source reports that Mr. Matalaev was provided with a State-appointed lawyer without informing him or his family. However, the lawyer did not represent Mr. Matalaev in an effective manner, failing to present evidence in court to defend him against the charges put forward by the State. Through his family, Mr. Matalaev was subsequently able to hire another, independent lawyer. However, this lawyer reportedly faced serious obstacles to represent Mr. Matalaev effectively. He had very limited access to Mr. Matalaev during the trial and to the documents and materials of the case. It is known that the lawyer saw his client only twice, once during the trial and once afterwards. In addition, the lawyer and Mr. Matalaev only received the trial court's judgment several months later in April 2017.

16. According to the source, a State investigator requested the family of Mr. Matalaev to pay the disputed amount to his female friend in order to remedy her situation. His relatives were reportedly led to believe that if they paid the amount back, the case against him would be dropped. Following this guidance, they paid the requested sum of money to the investigator before the trial, but the authorities did not close the case. The source underlines that the payment was not made with any admission of guilt on the part of Mr. Matalaev. After his arrest, the members of Mr. Matalaev's family became subjects of interest for the officials, and the authorities allegedly started to gather information about them at their places of employment.

Trial proceedings

17. The source reports that, on 8 November 2016, after a trial before the Criminal Court of Turkmenabad that lasted approximately 10 minutes, Mr. Matalaev was found guilty of fraud and bribery and sentenced to three years' imprisonment in the labour camp in Seydi, a desert prison in a remote part of eastern Turkmenistan.

18. According to the source, the court decision was based on the evidence presented by the State. Mr. Matalaev was found guilty of fraud in accordance with article 228, part 2, of the Criminal Code, as it was maintained that he had acquired a sum of money from his female friend by deceit and, instead of finding her employment, he had spent some of the money to repair his car. However, no evidence was provided to support this argument.

19. The State also maintained that Mr. Matalaev was guilty of bribery. It reportedly applied article 185, in conjunction with article 33, part 4, of the Criminal Code and claimed that Mr. Matalaev was an "instigator" in giving a bribe to the representative of the Chinese National Petroleum Corporation in return for employment for his female friend. However, the State did not corroborate this claim, nor did it identify a person or official who had received the bribe.

20. According to the source, the Court also decided to confiscate the money that the family of Mr. Matalaev had paid to remedy the situation of the female friend, as well as Mr. Matalaev's mobile telephone, stating that both were material evidence as they were used to commit crimes. The Court reportedly found Mr. Matalaev guilty on the basis of witness statements and other documents. However, no witnesses were examined or cross-examined in court, nor was the other evidence used to support the charges introduced during the trial that lasted only 10 minutes. The source notes that the only time Mr. Matalaev spoke during the hearing was to provide his biographical information and to present his guilty plea. In this respect, the source notes that since Mr. Matalaev is ethnic Kazakh, he did not fully understand the procedural language and thus was not able to agree knowingly to the charges.

21. The source reports that two lawyers were present during the hearing: one was State-appointed and the other was the independent lawyer hired by the family. No mass media representatives were allowed to attend the hearings. Neither Mr. Matalaev, nor his lawyer received a copy of the judgment until April 2017. According to the source, Mr. Matalaev did not appeal his sentence to a higher court fearing for his safety, including torture in prison.

22. The source indicates that the international human rights community launched a campaign against the imprisonment of Mr. Matalaev, exposing the political nature of his prosecution. They believe that if it had not been for political reasons, Mr. Matalaev would have been pardoned because reportedly many prisoners who are convicted of similar misdemeanours are normally pardoned.

23. In this respect, the source notes that under the current President who has been in power since 2006, several pardons have been granted each year. This practice differs from previous years when the President would pardon prisoners only once a year. A number of recent pardons were reportedly granted after the arrest of Mr. Matalaev: in December 2016, 560 people were pardoned; in February 2017, 828 people were pardoned; in June 2017, 1,029 people were pardoned; and in October 2017, 1,600 people were pardoned. According to the source, the fact that Mr. Matalaev was not pardoned on any of those occasions most likely indicates that his case is politically motivated.

24. The source also notes that the Human Rights Committee, in its concluding observations on the second periodic report of Turkmenistan, expressed its concern at the continuous use of harassment, intimidation, torture and arbitrary arrests, detention and convictions on reportedly politically motivated charges as a retaliatory tool against journalists, human rights activists, dissidents, members of religious groups and ethnic minorities, and members of non-governmental organizations interacting with foreigners, such as Mr. Matalaev.[1]

Analysis of violations

25. The source submits that the arrest and detention of Mr. Matalaev constitute an arbitrary deprivation of his liberty under categories I, II and III of the categories applicable to the consideration of cases by the Working Group.

Violation of category I — no legal basis

26. The source notes that, according to the Code of Criminal Procedure, the grounds upon which a person can be stopped, searched, arrested or detained, as well as the requirements for a detainee to remain in pretrial detention, are broad and not clearly defined.

27. The source also notes that, besides the vague provisions and weak guarantees contained in articles 140, 144, 149, 163, 172 and 187 of the Code of Criminal Procedure, no other safeguards are in place for the protection of persons deprived of their liberty. The source alleges that, since these norms are vague and not clearly defined as required by the Covenant, it is easy, in practice, for the State machinery to violate the provisions of article 9

[1] See CCPR/C/TKM/CO/2, para. 42 (d).

of the Covenant. In this respect, the source refers to paragraph 22 of the Human Rights Committee's general comment No. 35 (2014) on liberty and security of person, whereby any substantive grounds for arrest or detention must be prescribed by law and should be defined with sufficient precision to avoid overly broad or arbitrary interpretation or application.

28. The source underlines that, even if the local norms are vague and not clearly defined, the rights of Mr. Matalaev were violated under such norms as well. He was arrested without a warrant, he was not informed of the grounds for his arrest as outlined in article 140 of the Code of Criminal Procedure and he was kept in detention without being informed or charged for 15 days in violation of article 149 of the same Code. According to the source, it is thus clearly impossible to identify any legal basis to justify his detention, in accordance with category I.

29. As a consequence, the source submits that, because the Government failed to meet both national and international procedural safeguards for the arrest and detention of Mr. Matalaev and provide any substantive basis upon which to detain him, his deprivation of liberty was clearly arbitrary and unlawful, in violation of article 9 (1) of the Covenant and the relevant national legislation.

Violation of category II — substantive fundamental rights

30. The source notes that freedom of expression and opinion is guaranteed both by article 28 of the Constitution of Turkmenistan and international human rights treaties ratified by the State, in particular article 19 of the Covenant.

31. The source submits that Mr. Matalaev's exercise of this right prompted the Turkmen authorities to arrest, detain and heavily sentence him. He was arrested and subjected to detention merely on account of his desire to express an opinion, notably to inform and raise awareness among the international community about the human rights situation and unfair practices of forced labour in the cotton fields of Turkmenistan.

32. The source acknowledges that the right to freedom of expression and opinion, as enshrined in article 19 of the Covenant, is not an absolute right as it can be restricted on the following grounds: respect for the rights or reputations of others; and the protection of national security or of public order (*ordre public*), or of public health or morals. However, the source submits that none of those grounds arose in this particular case to justify the actions of the State, which has not demonstrated that the restriction was necessary in accordance with the terms of the provision. The source thus submits that Turkmenistan violated Mr. Matalaev's rights to freedom of expression and opinion, and also to peaceful assembly, which are guaranteed by articles 19 and 21 of the Covenant and articles 19 and 20 of the Universal Declaration of Human Rights, as a result of which he was subjected to arbitrary deprivation of liberty based on trumped-up charges.

33. The source underlines that the Government of Turkmenistan responded to Mr. Matalaev's peaceful and legitimate human rights activism through unwarranted arrest and detention, unfounded criminal charges and, finally, through imprisonment without guaranteeing the right to due process. The source asserts that the Government has also violated Mr. Matalaev's rights as a human rights defender, in particular articles 6 and 9 of the Declaration on Human Rights Defenders. In this context, the source notes that the sentence imposed on Mr. Matalaev "solely for exercising his rights" has a recognized chilling effect, not only on his rights, but also on those of other members of civil society at large whose criticism is silenced due to fear of similar government retaliation.

34. The source further submits that Mr. Matalaev's deprivation of liberty results from the exercise of his right to political participation and has placed "unreasonable restrictions" on "the right and the opportunity" of Mr. Matalaev to take part in public affairs for two distinct reasons. First, as demonstrated above, his detention stems from an act of civil participation as a journalist and human rights defender, and his arrest, detention and criminal prosecution amount to punitive restrictions on the very act of exercising his civil rights as a citizen, which are undoubtedly "unreasonable restrictions" in violation of article 25 of the Covenant and article 21 of the Universal Declaration of Human Rights. Second, given that Mr. Matalaev has no opportunity to engage in public affairs due to his current

detention, the Government has placed "unreasonable restrictions" on his opportunity to engage in political discourse.

Violation of category III — right to due process

35. According to the source, the failure of the State to inform Mr. Matalaev of the reasons for his arrest constituted a violation of article 9 (2) of the Covenant. He was not presented with an official warrant for his arrest. He and his family were told that he was being arrested because he had allegedly put photographs on the Internet, and no other valid reasons for his arrest were provided. The authorities did not describe what kind of photographs on the Internet were the reason for the detention, how the existence of those photographs served as a reason for the arrest and how his actions violated the law. Furthermore, he was kept unaware of the official reasons for his detention until the criminal charges were announced to him on 21 October 2016, 15 days after his arrest.

36. The source also submits that the substantial period of pretrial detention, without being brought before a judge to contest the charges, constituted a violation of article 9 (3) of the Covenant. In addition, Mr. Matalaev was held incommunicado from 4 October to 8 November 2016, as he did not have access to his family and the access to the "independent" lawyer who represented his interests was severely limited. The lawyer saw Mr. Matalaev only once before the trial, and the State-appointed attorney, while he had access to Mr. Matalaev, was neither independent nor competent to effectively represent his interests. In addition, the source notes that Mr. Matalaev was denied his right to release pending trial, which as a general rule should be conferred on persons charged of a crime under article 9 (3) of the Covenant.

37. The source further submits that the failure of the State to guarantee the right of Mr. Matalaev to be brought promptly before a judge in order to contest the charges against him constituted a simultaneous violation of the right to habeas corpus, which is embodied in article 9 (4) of the Covenant.

38. As a consequence, the State has reportedly failed to meet both the national and international procedural safeguards in the course of arresting and detaining Mr. Matalaev and to provide any substantive basis upon which to detain him, which makes his arrest and detention clearly arbitrary and unlawful.

39. The source asserts that Mr. Matalaev's detention is arbitrary and unlawful because he was subject to torture and cruel punishment, in violation of article 7 of the Covenant and articles 2 and 15 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. He was allegedly tortured with electric shocks and repeatedly subjected to acts amounting to torture in order to make him confess to the crime that the Government had charged him with. The source notes that, under these grave circumstances of fear of torture, Mr. Matalaev was not able to file a complaint with the authorities to ask for a proper investigation, as required under articles 7 and 12 of the Convention against Torture.

40. The source also asserts that Mr. Matalaev was not able to exercise his right to a fair trial and that the trial procedures before the Criminal Court failed to adhere to established national and international standards. The trial hearing lasted for about 10 minutes and the Court was not impartial. It failed to objectively review the case of Mr. Matalaev since witnesses were not examined or cross-examined, prosecutors failed to present sufficient evidence and he was not able to understand the language used in the courtroom.

41. The source notes that the impartiality and independency of the Court must be called into question since it found Mr. Matalaev guilty within 10 minutes of a trial that, on the basis of any objective reasonable standard, cannot be considered adequate to consider all the evidence and to examine witnesses. Such facts indicate that the Court made its decision prior to the trial, which is a clear violation of the principle of the presumption of innocence.

42. According to the source, Mr. Matalaev was appointed a State lawyer who did not represent him effectively, failing to provide an adequate defence. While the family was able to find a new lawyer, the stifling political environment in Turkmenistan reportedly means that defence lawyers prefer not to be involved in criminal cases so as to avoid possible

retaliation. Even after obtaining new legal representation, Mr. Matalaev still did not get effective legal assistance because the new lawyer had very limited access to him. The new lawyer met Mr. Matalaev only twice, once before the trial and once after it.

43. The source states that this set of circumstances clearly affected the trial of Mr. Matalaev. He was tried and sentenced in just 10 minutes on the basis of uncontested witness testimonies, including preliminary declarations made by witnesses who were not present at the trial and that of the female friend of Mr. Matalaev, who was the State's main witness and who was not examined during the trial.

44. In the light of the foregoing, the source submits that Mr. Matalaev did not benefit from a fair hearing conducted by an independent and impartial tribunal, in violation of articles 9 and 14 of the Covenant, article 11 of the Universal Declaration of Human Rights, principles 15, 16, 17 and 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, and national procedural law.

Response from the Government

45. On 17 January 2018, the Working Group transmitted the allegations from the source to the Government through its regular communication procedure. The Working Group requested the Government to provide, by 19 March 2018, detailed information about the current situation of Mr. Matalaev and any comments on the source's allegations.

46. The Working Group regrets that it did not receive a response from the Government, nor did the Government request an extension of the time limit for its reply, as provided for in the Working Group's methods of work.

Discussion

47. In the absence of a response from the Government, the Working Group has decided to render the present opinion, in conformity with paragraph 15 of its methods of work.

48. The Working Group has, in its jurisprudence, established the ways in which it deals with evidentiary issues. If the source has established a prima facie case for breach of international requirements constituting arbitrary detention, the burden of proof should be understood to rest upon the Government if it wishes to refute the allegations (see A/HRC/19/57, para. 68). In the present case, the Government has chosen not to challenge the prima facie credible allegations made by the source.

49. The source has submitted that the detention of Mr. Matalaev is arbitrary and falls under categories I, II and III. The Working Group shall consider these in turn.

50. The source argues that the arrest of Mr. Matalaev had no legal basis since his arrest was based on vaguely formulated legal provisions, since he was not presented with an arrest warrant at the time of his arrest, and since he was kept in detention for 15 days without being informed of any charges against him. The Working Group notes that the Government has chosen not to reply to these submissions, although it had the opportunity to do so.

51. The Working Group recalls that article 9 (2) of the Covenant requires that anyone who is arrested is not only promptly informed of the reasons for arrest but also promptly informed of any charges against them. The right to be promptly informed of charges concerns notice of criminal charges and, as the Human Rights Committee has noted in paragraph 29 of its general comment No. 35, this right applies in connection with ordinary criminal prosecutions and also in connection with military prosecutions or other special regimes directed at criminal punishment.

52. The Working Group notes that, while Mr. Matalaev was arrested without a warrant, the officers arresting him said that he was being arrested for posting some photographs on the Internet. The Working Group also notes that this was not the real reason for Mr. Matalaev's arrest as was later evidenced by the charges and his trial. Moreover, following the arrest, Mr. Matalaev was kept in detention for 15 days without any notification of the charges against him. The Working Group therefore concludes that there has been a breach of article 9 (2) of the Covenant.

53. Furthermore, in order to establish that a detention is indeed legal, anyone detained has the right to challenge the legality of his or her detention before a court, as envisaged by article 9 (4) of the Covenant. The Working Group wishes to recall that, according to the United Nations Basic Principles and Guidelines on Remedies and Procedures on the Right of Anyone Deprived of Their Liberty to Bring Proceedings Before a Court, the right to challenge the lawfulness of detention before a court is a self-standing human right, which is essential to preserve legality in a democratic society.[2] This right, which is in fact a peremptory norm of international law, applies to all forms of deprivation of liberty,[3] applies to all situations of deprivation of liberty, including not only detention for purposes of criminal proceedings, but also to situations of detention under administrative and other fields of law, including military detention, security detention, detention under counter-terrorism measures, involuntary confinement in medical or psychiatric facilities, migration detention, detention for extradition, arbitrary arrests, house arrest, solitary confinement, detention for vagrancy or drug addiction, and detention of children for educational purposes.[4] Moreover, it also applies irrespective of the place of detention or the legal terminology used in the legislation. Any form of deprivation of liberty on any ground must be subject to effective oversight and control by the judiciary.[5]

54. The Working Group notes that, in order to ensure an effective exercise of this right, the detained persons should have access, from the moment of arrest, to the legal assistance of their own choosing as stipulated in the Basic Principles and Guidelines.[6] This was denied to Mr. Matalaev, which had a serious adverse impact on his ability to effectively exercise his right to challenge the legality of his detention, denying him his rights under article 9 (4) of the Covenant.

55. The Working Group therefore concludes that, since the detention of Mr. Matalaev took place without an arrest warrant, since no formal charges were brought against him for 15 days and since he was effectively prevented from exercising his right to challenge the legality of detention, his arrest and detention is arbitrary and falls under category I.

56. The source further argues that the detention of Mr. Matalaev falls under category II since his detention was a direct result of his exercise of the freedom of expression and opinion as guaranteed by article 19 of the Covenant. The Working Group notes that the Government has chosen not to reply to these submissions, although it had the opportunity to do so.

57. The Working Group notes that, as the Human Rights Committee states in its general comment No. 34 (2011) on the freedoms of opinion and expression, freedom of opinion and freedom of expression as expressed in article 19 of the Covenant are indispensable conditions for the full development of the person; they are essential for any society and, in fact, constitute the foundation stone for every free and democratic society.

58. In the same general comment, the Committee states that freedom of expression includes the right to seek, receive and impart information and ideas of all kinds regardless of frontiers, and this right includes the expression and receipt of communications of every form of idea and opinion capable of transmission to others, including political opinions. Moreover, the permitted restrictions to this right may relate to respect for the rights or reputations of others, or the protection of national security, public order (*ordre public*) or public health or morals. As the Human Rights Committee has stipulated, restrictions are not allowed on grounds not specified in paragraph 3, even if such grounds would justify restrictions on other rights protected in the Covenant. Restrictions must be applied only for those purposes for which they were prescribed and must be directly related to the specific need on which they are predicated.

[2] See A/HRC/30/37, paras. 2–3.
[3] Ibid., para. 11.
[4] Ibid., annex, para. 47 (a).
[5] Ibid., para. 47 (b).
[6] Ibid., principle 9.

59. In the present case, although the charges brought against Mr. Matalaev appear not to be connected to his activities as a human rights defender and his reporting on forced labour in Turkmenistan, the Working Group notes that the Human Rights Committee, in the above-mentioned concluding observations on the second periodic report of Turkmenistan, expressed its concerns at the continuous use of harassment, intimidation, torture and arbitrary arrests, detention and convictions on reportedly politically motivated charges as a retaliatory tool against journalists, human rights activists, dissidents, members of religious groups and ethnic minorities, and members of non-governmental organizations interacting with foreigners, such as Mr. Matalaev.

60. The Working Group also notes that the present case has been the subject of a joint allegation letter sent on 1 May 2017 by the Working Group, the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, the Special Rapporteur on the situation of human rights defenders and the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment and acknowledges the response from the Government to this joint communication.[7]

61. The Working Group is convinced that the present case against Mr. Matalaev is an attempt by the Government to censor his activities as a human rights defender and curtail his freedom of expression. The Working Group therefore concludes that the detention of Mr. Matalaev is arbitrary and falls under category II. The Working Group refers the present case to the Special Rapporteur on human rights defenders for appropriate action.

62. Given its finding that the deprivation of liberty of Mr. Matalaev is arbitrary under category II, the Working Group wishes to emphasize that the trial should never have taken place. However, the trial did take place and the source has submitted that there were severe violations of the right to a fair trial and that Mr. Matalaev's subsequent detention therefore falls under category III.

63. In particular, the source has submitted that Mr. Matalaev was held incommunicado from 4 October to 8 November 2016; he had no access to his lawyer or family; the lawyer appointed by the State did not properly represent his interests while the lawyer chosen by himself was denied access to the full case file; he was subjected to torture and ill-treatment to extract a confession; the Court hearing in which he was found guilty lasted only 10 minutes; he did not fully understand the language spoken at the hearing; and the final judgment was not provided to his lawyer until some five months later. The Working Group notes that the Government has chosen not to reply to these submissions, although it had the opportunity to do so.

64. The Working Group is very concerned at the allegations, uncontested by the Government, that Mr. Matalaev was held in incommunicado detention for over a month prior to his trial. The Working Group in its practice has always consistently argued that holding persons incommunicado breaches the right to challenge the lawfulness of detention before a judge.[8] Articles 10 and 11 of the Universal Declaration of Human Rights also confirm the impermissibility of incommunicado detention. Furthermore, the Committee against Torture has made it clear that incommunicado detention creates conditions that lead to violations of the Convention against Torture;[9] the Special Rapporteur on torture has consistently argued that the use of incommunicado detention is unlawful;[10] and the Human Rights Committee, in its general comment No. 35, has stated that incommunicado detention that prevents prompt presentation before a judge inherently violates article 9 (3).

65. Equally, the Working Group is seriously concerned at the allegations of torture and ill-treatment and the extraction of a confession made by the source in relation to Mr. Matalaev, especially noting that the Government has not contested these allegations. The treatment described would appear to reveal a prima facie breach of the absolute prohibition

[7] AL TKM 1/2017. Available at https://spcommreports.ohchr.org/TMResultsBase/DownLoadPublicCommunicationFile?gId=23099.

[8] See, for example, opinions No. 56/2016, No. 53/2016, No. 9/2017 and No. 10/2017.

[9] See, for example, A/54/44, para. 182 (a).

[10] See, for example, A/54/426, para. 42; and A/HRC/13/39/Add.5, para. 156.

of torture, which is a peremptory norm of international law, as well as of the Convention against Torture, to which Turkmenistan is a party, principle 6 of the Body of Principles and rule 1 of the United Nations Standard Minimum Rules for the Treatment of Prisoners (the Nelson Mandela Rules).

66. The Working Group also notes that the use of a confession extracted through ill-treatment that is tantamount, if not equivalent, to torture may also constitute a violation by Turkmenistan of its international obligations under article 15 of the Convention against Torture. Furthermore, the Body of Principles specifically prohibits taking undue advantage of the situation of a detained person to compel him or her to confess or make incriminating statements (see principle 21).[11] It is also a breach of article 14 (3) (g) of the Covenant. The Working Group refers the present case to the Special Rapporteur on torture for appropriate action.

67. The Working Group has already established a violation of article 9 through the denial of legal assistance to Mr. Matalaev during his pretrial detention. The Working Group considers that this violation continued and in fact constituted a further breach of article 14 (3) (b) of the Covenant as the lawyer that Mr. Matalaev chose to represent him faced numerous impediments imposed by the authorities that prevented him from effectively representing the rights of his client. The Working Group thus observes that he was unable to meet with his client freely and was denied access to the documents and materials of the case. This is not only a violation of article 14 (3) (b) of the Covenant, but also of principle 17 (1) of the Body of Principles and principle 9 of the Basic Principles and Guidelines.

68. The Working Group also observes that Mr. Matalaev's right to have his sentence reviewed by a higher tribunal (article 14 (5) of the Covenant) was violated as the final judgment of the court was not given to him or his lawyer until some five months later. This delay prevented Mr. Matalaev from exercising his right to appeal promptly, as well as denying him his right to a prompt hearing as enshrined in article 14 (3) (c) of the Covenant.

69. The Working Group further notes the submission that Mr. Matalaev, an ethnic Kazakh, did not fully understand the language used in court, a claim that the Government has chosen not to contest. This is a further breach of article 14 (3) (f) of the Covenant.

70. The Working Group is disturbed by the submission made by the source that the trial of Mr. Matalaev on 8 November 2016, which resulted in his conviction and a sentence to three years' imprisonment, lasted only 10 minutes. The Working Group observes that the Government has chosen not to contest this submission, although it had the opportunity to do so.

71. In the view of the Working Group, this is a blatant violation of the guarantees of a fair trial and of equality of arms as enshrined in article 14 of the Covenant since a trial of only 10 minutes cannot, under any circumstances, be said to fulfil such guarantees. In such a short period of time, it would have been impossible for the prosecution to present its case and witnesses, let alone for Mr. Matalaev and his lawyers to present their defence, examine the prosecution witnesses and present their own witnesses. In fact, it appears to the Working Group that the hearing on 8 November 2016 was nothing more than a mere "rubber stamping" of a predetermined decision.

72. Moreover, the denial of full access to the case file to the lawyer of Mr. Matalaev is a serious violation of the principle of equality of arms under article 10 of the Universal Declaration of Human Rights and of article 14 (1) and (3) (b) of the Covenant concerning the right to a fair hearing and to have adequate time and facilities for the preparation of his or her defence in full equality.[12] Since the Government did not submit any information in response to the Working Group's regular communication, it has therefore not demonstrated why restricting access to the case file was necessary and proportionate in pursuing a

[11] See also opinions No. 48/2016, No. 3/2017, No. 6/2017 and No. 29/2017.

[12] See, for example, opinions No. 19/2005, para. 28 (b); No. 50/2014, para. 77; No. 89/2017, para. 56; and No. 18/2018, paras. 52–53, in which the Working Group reached a similar conclusion on the violation of the principle of equality of arms when classified information is withheld from the defendant.

legitimate aim, such as national security. The Working Group considers that such a denial of access to the case file is a violation of article 14 of the Covenant.

73. Consequently, the Working Group finds that the detention of Mr. Matalaev resulted from a trial that totally ignored the international norms relating to the right to a fair trial and especially his rights under article 14 (1) (3) (a) (b) (c) (g) (f) and (5) of the Covenant. These violations were of such gravity as to render the detention of Mr. Matalaev arbitrary, falling under category III.

74. Finally, the Working Group is of the view that the arrest and subsequent detention of Mr. Matalaev is a targeted action by the Turkmen authorities against a prominent human rights defender in the country. The Working Group takes special note of the fact that: Mr. Matalaev is an independent reporter for Alternative Turkmenistan News, a voice critical of the Turkmen authorities; he was arrested only two days after the publication of his report on the extensive use of forced labour in Turkmenistan; the reasons that were given to him at the time of his arrest (publication of photographs) were false since he was charged with entirely different offences; and his case appears to have been deliberately excluded from the presidential pardon. In the absence of any explanation from the Government, the Working Group therefore concludes that the detention of Mr. Matalaev also falls under category V on the basis of the discrimination against him as a human rights defender.

Disposition

75. In the light of the foregoing, the Working Group renders the following opinion:

> The deprivation of liberty of Gaspar Matalaev, being in contravention of articles 1, 2, 7, 9, 10 and 19 of the Universal Declaration of Human Rights and of articles 9, 14, 19 and 26 of the International Covenant on Civil and Political Rights, is arbitrary and falls within categories I, II, III and V.

76. The Working Group requests the Government of Turkmenistan to take the steps necessary to remedy the situation of Mr. Matalaev without delay and bring it into conformity with the relevant international norms, including those set out in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.

77. The Working Group considers that, taking into account all the circumstances of the case, the appropriate remedy would be to release Mr. Matalaev immediately and accord him an enforceable right to compensation and other reparations, in accordance with international law.

78. The Working Group urges the Government to ensure a full and independent investigation of the circumstances surrounding the arbitrary deprivation of liberty of Mr. Matalaev, and to take appropriate measures against those responsible for the violation of his rights.

79. In accordance with paragraph 33 (a) of its methods of work, the Working Group refers the present case to the Special Rapporteur on human rights defenders and the Special Rapporteur on torture for appropriate action.

Follow-up procedure

80. In accordance with paragraph 20 of its methods of work, the Working Group requests the source and the Government to provide it with information on action taken in follow-up to the recommendations made in the present opinion, including:

(a) Whether Mr. Matalaev has been released and, if so, on what date;

(b) Whether compensation or other reparations have been made to Mr. Matalaev;

(c) Whether an investigation has been conducted into the violation of Mr. Matalaev's rights and, if so, the outcome of the investigation;

(d) Whether any legislative amendments or changes in practice have been made to harmonize the laws and practices of Turkmenistan with its international obligations in line with the present opinion;

(e) Whether any other action has been taken to implement the present opinion.

81. The Government is invited to inform the Working Group of any difficulties it may have encountered in implementing the recommendations made in the present opinion and whether further technical assistance is required, for example, through a visit by the Working Group.

82. The Working Group requests the source and the Government to provide the above information within six months of the date of the transmission of the present opinion. However, the Working Group reserves the right to take its own action in follow-up to the opinion if new concerns in relation to the case are brought to its attention. Such action would enable the Working Group to inform the Human Rights Council of progress made in implementing its recommendations, as well as any failure to take action.

83. The Government should disseminate through all available means the present opinion among all stakeholders.

84. The Working Group recalls that the Human Rights Council has encouraged all States to cooperate with the Working Group and requested them to take account of its views and, where necessary, to take appropriate steps to remedy the situation of persons arbitrarily deprived of their liberty, and to inform the Working Group of the steps they have taken.[13]

[*Adopted on 17 April 2018*]

[13] See Human Rights Council resolution 33/30, paras. 3 and 7.